



**Billing Code: 5001-06**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**[Docket ID: DoD–2018-OS-0024]**

**Manual for Courts-Martial; Proposed Amendments**

**AGENCY:** Joint Service Committee on Military Justice (JSC), Department of Defense.

**ACTION:** Notice of response to public comments on proposed amendments to the Manual for Courts-Martial, United States (2016 ed.).

**SUMMARY:** The Joint Service Committee on Military Justice (JSC) is publishing the response to public comments concerning amendments to the Manual for Courts-Martial, United States (MCM). These amendments include provisions implementing the Military Justice Act of 2016 and subsequent amendments necessitated by follow-on legislation. The changes concern the rules of procedure and evidence applicable in trials by court-martial, nonjudicial punishment proceedings, and the punitive articles of the Uniform Code of Military Justice. Also included is a proposed revision of Appendix 12A of the Manual for Courts-Martial concerning lesser included offenses. The approval authority for these changes is the President. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.01, “Preparing, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony,” June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

**FOR FURTHER INFORMATION CONTACT:** LT Alexandra Nica, JAGC, USN, (202) 685-7058 or [alexandra.nica@navy.mil](mailto:alexandra.nica@navy.mil).

**SUPPLEMENTARY INFORMATION:**

## **Background**

On July 11, 2017 (79 FR 59938-59959), the JSC published a Notice of Proposed Amendments concerning procedure and evidence applicable in trials by court-martial, non-judicial punishment proceedings, and the punitive articles of the Uniform Code of Military Justice as amended by the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017 and follow-on changes made by the National Defense Authorization Act for Fiscal Year 2018. The Notice also included a proposed revision of Appendix 12A of the Manual for Courts-Martial concerning lesser included offenses and a Notice of Public Meeting to receive comments on these proposals. The public meeting was held on August 3, 2017. Two members of the public provided oral comments at the public meeting, and both members of the public also submitted written comments electronically. Several additional written comments were received electronically. All comments were considered by the JSC.

## **Public Comments**

Comments and materials received from the public are available under Docket ID Number DOD-2017-OS-0032, and at the following link <https://www.regulations.gov/docket?D=DOD-2017-OS-0032>.

## **Discussion of Comments and Changes**

The JSC considered each public comment and made some modifications to the proposed amendments accordingly.

a. Several comments concerning orthography, grammar, and syntax were received and reviewed, and corrections were made throughout the Manual for Courts-Martial.

b. The extensive nature of the proposed changes necessitated the reproduction, in full, of Parts I-V of the Manual for Courts-Martial and, although not a part of the proposed Executive Order or issued by the President, the Analyses and Discussions were set forth immediately following the provisions and paragraphs to which they pertained to facilitate review and comment on the proposed amendments. Additionally, Appendix 2.1 provided proposed non-binding guidance to be issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 833. Comments were received suggesting changes to Analyses, Discussions, and the Appendices. These comments are being considered by the JSC and the Department of Defense in the preparation of the supplementary materials.

c. The Department of Defense published several proposals concerning impaneling and excusing excess members and specifically solicited comments as to the optimal rule for removing excess members consistent with Article 36 of the Uniform Code of Military Justice. Several comments were received regarding the different proposals. Proposal #1, providing for the random assignment of numbers to remaining members by the military judge, was incorporated.

d. A comment proposing a change to R.C.M. 804 to ensure that court-martial attendance by the accused constitutes the accused's appointed place of duty for purposes of pay and allowance was received. The comment highlighted that multiple courts had granted confinement credit for accused who did not receive normal pay and allowances or had to pay for their own travel and housing during the pendency of the court-martial. The JSC has adopted this proposal as follows:

**- R.C.M. 804(a) is amended to read as follows:**

“(a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges

of members, the return of the findings, presentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule. Attendance at these proceedings shall constitute the accused's appointed place of duty and, with respect to the accused's travel allowances, none of these proceedings shall constitute disciplinary action. This does not in any way limit authority to implement restriction, up to and including confinement, as necessary in accordance with R.C.M. 304 or R.C.M. 305."

e. A comment was received proposing changes to R.C.M. 703 and R.C.M. 405 to incorporate Fed. R. Crim. Proc. 17 which was created in 2008 to comply with the requirements of the Federal Crime Victims' Rights Act, ("FCVRA"), codified at 18 U.S.C. 3771. The JSC has adopted this proposal in part as follows:

**- R.C.M. 703(g)(3)(C)(2) is new and reads as follows:**

*"(2) Subpoenas for personal or confidential information about a victim. After prefferal, a subpoena requiring the production of personal or confidential information about a victim named in a specification may be served on an individual or organization by those authorized to issue a subpoena under subparagraph (D) or with the consent of the victim. Before issuing a subpoena under this subparagraph and unless there are exceptional circumstances, the victim must be given notice so that the victim can move for relief under subparagraph (g)(3)(G) or otherwise object."*

f. A comment was received suggesting the addition of a new M.R.E. 501(e) limiting the Government to privileges identified in M.R.E. 505, 506, and 507. These suggested changes were not incorporated; however, the JSC reviewed M.R.E. 505, 506, and 507 and made the following proposed change to M.R.E. 506.

**- M.R.E. 506(b) is amended to read as follows:**

“(b) Scope. “Government information” includes official communication and documents and other information within the custody or control of the Federal Government. This rule does not apply to the identity of an informant (Mil. R. Evid. 507).”

g. Comments concerning the proposed changes to M.R.E. 412(c)(3) were received. The JSC considered all comments. As prescribed by the President, upon the effective date of the Executive Order, M.R.E. 412(c)(3) will provide:

“(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant for a purpose under subdivision (b)(1) or (2) of this rule and that the probative value of such evidence outweighs the danger of unfair prejudice to the victim’s privacy, or that the evidence is described by subdivision (b)(3) of this rule, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the victim may be examined or cross-examined. Any evidence introduced under this rule is subject to challenge under Mil. R. Evid. 403.”

h. Comments were received suggesting additional changes to, R.C.M. 1103A in Annex 1 and R.C.M. 103, 110, 305, 405, 701, 705, 809, 910, 1109, 1114, 1202 in Annex 2. These suggested changes were not incorporated.

i. Comments suggesting changes to M.R.E. 505 were received. Suggested changes were not incorporated.

j. Comments were received suggesting the addition of new punitive articles, elimination of certain defenses, and changes to the terminal element of Article 134. These suggested changes were not incorporated.

Dated: May 7, 2018.

**Shelly E. Finke,**

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